FILED
APR 4 1997
CLERK

(10)

No. 96-871

In the Supreme Court of the United States

OCTOBER TERM, 1996

STATE OIL COMPANY, PETITIONER

v.

BARKAT U. KHAN, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION AND THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC. AS AMICI CURIAE SUPPORTING PETITIONER

PHILLIP D. BRADY
American Automobile Manufacturers Association
1401 H Street, N.W.
Suite 900
Washington, D.C. 20005

CHARLES H. LOCKWOOD, II
Association of International Automobile Manufacturers, Inc.
1001 19th Street North
Suite 1200
Arlington, Virginia 22209

STEPHEN M. SHAPIRO
ROY T. ENGLERT, JR.
Counsel of Record
DONALD M. FALK
MYLES R. HANSEN
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

Counsel for Amici Curiae

34 pp

QUESTION PRESENTED

This brief addresses only the second question presented in the petition for a writ of certiorari:

Whether maximum resale price maintenance should continue to be prohibited *per se* under the antitrust laws.

TABLE OF CONTENTS

QUESTION PRESENTED ..... (i)

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT .. 3

ARGUMENT 4

I. *PER SE* CONDEMNATION OF MAXIMUM RESALE PRICE MAINTENANCE CONFLICTS WITH MODERN ANTITRUST POLICY AND PRECEDENT 4

II. PER SE CONDEMNATION OF MAXIMUM RESALE PRICE MAINTENANCE IMPEDES OR DETERS SUBSTANTIAL PROCOMPETITIVE CONDUCT IN THE AUTOMOBILE INDUSTRY .. 12

III. *STARE DECISIS* DOES NOT WARRANT RETAINING *PER SE* CONDEMNATION OF RESALE PRICE MAINTENANCE 25

CONCLUSION 27

TABLE OF AUTHORITIES

Page

Cases

AAA Liquors, Inc. v. *Joseph E. Seagram & Sons, Inc.*, 705 F.2d (10th Cir. 1982), cert. denied, 461 U.S. 919 (1983) 23

Albrecht v. *Herald Co.*, 390 U.S. 145 (1968) ..... *passim*

Arizona v. *Maricopa County Medical Society*, 457 U.S. 332 (1982) 4, 8

Atlantic Richfield Co. v. *USA Petroleum Co.*, 495 U.S. 328 (1990) ..... *passim*

Brooke Group Ltd. v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) 5

Business Electronics Corp. v. *Sharp Electronics Corp.*, 485 U.S. 717 (1988) ..... *passim*

Continental T.V., Inc. v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) ..... *passim*

Discon, Inc. v. *NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996) 24

Dr. Miles Medical Co. v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911) 9

FLM Collision Parts, Inc. v. *Ford Motor Co.*, 543 F.2d 1019 (2d Cir. 1976), cert. denied, 429 U.S. 1097 (1977) 24

Guardians Ass'n v. *Civil Service Comm'n of New York*, 463 U.S. 582 (1983) 26

Lewis Service Center, Inc. v. *Mack Trucks, Inc.*, 714 F.2d 842 (8th Cir. 1983), cert. denied, 409 U.S. 1077 (1984) 24

Matsushita Electric Industrial Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) 9, 11

Northern Pacific Ry. v. *United States*, 356 U.S. 1 (1958) 5

Pearl Brewing Co. v. *Anheuser-Busch, Inc.*, 339 F. Supp. 945 (S.D. Tex. 1972) 24

Reiter v. *Sonotone Corp.*, 442 U.S. 330 (1979) 11

United States v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) 9, 26

Statutes

15 U.S.C. § 1232(f) 13

Sup. Ct. R. 37 2

Miscellaneous

ABA ANTITRUST SECTION, FRANCHISE PROTECTION: LAWS AGAINST TERMINATION AND THE ESTABLISHMENT OF ADDITIONAL FRANCHISES (Monograph No. 17, 1990) 13

3 P. AREEDA & D. TURNER, ANTITRUST LAW (1978) ... 6, 11

8 P. AREEDA, ANTITRUST LAW (1989) ..... *passim*

Baumol & Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985) 24, 26

R. BORK, THE ANTITRUST PARADOX (1978; 1993 ed.) ... 6, 8

S. BREYER, REGULATION AND ITS REFORM (1982) 8, 10

Brief for the United States as Amicus Curiae, *Arizona* v. *Maricopa County Medical Society*, No. 80-419 8

BUREAU OF ECONOMICS STAFF REP. TO THE FEDERAL TRADE COMM'N, THE EFFECT OF STATE ENTRY REGULATION ON RETAIL AUTOMOBILE MARKETS (1986) 13

Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) 24-25

Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886 (1981) 6

Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135 (1984) 13, 15, 26

Eskridge, *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988) 26

Feds' Pricing Probe May Tie Up Industry For Years, AUTOMOTIVE NEWS, Oct. 17, 1994, at 1 23

In Defense of Car Dealers, BUS. WK., Apr. 18, 1996, at 17 (letter from John P. Peterson, President, National Automobile Dealers Ass'n) 13

Ippolito, *Resale Price Maintenance: Empirical Evidence From Litigation*, 34 J.L. & ECON. 263 (1991) 6, 7, 24

G.F. MATHEWSON & R.A. WINTER, COMPETITION POLICY AND VERTICAL EXCHANGE (1985) 6, 14, 18

D. O'BRIEN, SUPREME COURT WATCH–1993 26

Pitofsky, *In Defense of Discounters: The No-frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487 (1983) 11

Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981) 5

R. POSNER, ANTITRUST LAW (1976) 7

The 100 Year Almanac, AUTOMOTIVE NEWS, April 24, 1996 12

Warren-Boulton, *Resale Price Maintenance Reexamined:* Monsanto *v.* Spray-Rite, in THE ANTITRUST REVOLUTION 371 (J. Kwoka & L. White eds., 1989) 6

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-871

STATE OIL COMPANY, PETITIONER
v.
BARKAT U. KHAN, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION AND THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC. AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE AMICI CURIAE

The American Automobile Manufacturers Association ("AAMA") is a non-profit national trade organization. Its member companies — General Motors Corporation, Ford Motor Corporation, and Chrysler Corporation — are the largest automobile manufacturers in the United States. The Association of International Automobile Manufacturers, Inc. ("AIAM") is a trade association organized as a non-profit Virginia corporation representing United States subsidiaries of international automobile manufacturers that sell vehicles in the United States that are

manufactured both here and abroad.[1] The AAMA and AIAM have often represented their members before this Court and other tribunals.[2]

This case presents the Court with the opportunity to revisit the *per se* prohibition of maximum resale price maintenance under the antitrust laws. Maximum resale price maintenance — that is, a manufacturer's imposition of a ceiling on the retail price of its goods — is an important competitive weapon for manufacturers that face intense interbrand competition but distribute their products to the public primarily through independent dealers. The issue presented in this case is of substantial importance to the members of the AAMA and the AIAM because each distributes its vehicles primarily through networks of independently owned local dealers.

Amici support the views presented below with examples from their experience competing in an industry marked by intense interbrand competition at the producer level. It is their experience that price competition among manufacturers can be diminished by intermediary dealers whose interests may not always coincide with the competitive needs of the manufacturers. Maximum resale price maintenance provides an effective way for manufacturers to ensure that the benefits of interbrand competition are passed through to consumers. For that reason, and because of the unlikelihood that maximum resale price

---

[1] The members of the AIAM include American Honda Motor Co. Inc., American Suzuki Motor Corporation, BMW of North America, Inc., Daewoo Motor Co., Ltd., Fiat Auto U.S.A., Inc., Hyundai Motor America, Isuzu Motors America, Inc., Mazda Motor of America, Inc., Mitsubishi Motor Sales of America, Inc., Nissan North America, Inc., Peugeot Motors of America, Inc., Porsche Cars North America, Inc., Rolls-Royce Motor Cars, Inc., Saab Cars USA, Inc., Subaru of America, Inc., Toyota Motor Sales U.S.A., Inc., Volkswagen of America, Inc., and Volvo North America Corporation.

[2] Pursuant to Sup. Ct. R. 37, letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

maintenance has any anticompetitive effects, rule-of-reason treatment of maximum resale price maintenance is appropriate as a matter of antitrust law and policy. Furthermore, such treatment is likely to produce tangible consumer benefits in the sale of automobiles.

INTRODUCTION AND SUMMARY OF ARGUMENT

The continued *per se* condemnation of maximum resale price maintenance is a triumph of formalistic labeling over substance, because price ceilings almost always benefit consumers. By no stretch of the imagination does a practice that tends to reduce prices in a single brand cause competitive harm in the run of cases. Indeed, it is unlikely that maximum resale price maintenance in itself causes any competitive harm.

Without confirmed anticompetitive effects, maximum resale price maintenance has no place in the narrow class of *per se* offenses. Rather, the practice should be presumptively permissible under the rule of reason. But there is another powerful reason to permit the practice whenever it survives rule-of-reason analysis. As we explain below, the *per se* prohibition deters substantial procompetitive behavior by preventing manufacturers from ensuring that economic incentives offered at the wholesale level in fact reach the targeted consumers who determine the competitive outcome. Vertical price ceilings (and similar devices that require wholesale price reductions to be passed through to consumers) can both hold down consumer prices and intensify interbrand competition among automobile manufacturers. The effect of those techniques is greatly weakened, to the point of discouraging their use, when they cannot be enforced effectively.

Finally, concerns about *stare decisis* should not prevent this Court from reconsidering and abandoning *per se* treatment of maximum resale price maintenance. The history of the antitrust laws reflects an evolution of common-law doctrines. For the same reason that this Court hesitates to create new *per se* rules without a conclusive demonstration that a practice is

anticompetitive in all but the exceptional case, the Court should not leave in place a *per se* rule proscribing an activity that demonstrably will benefit consumers in many instances and harm them in few. Maximum resale price maintenance should be returned to the repertoire of business practices that are permissible unless proved anticompetitive, and *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968), therefore should be overruled.

ARGUMENT

Antitrust law is driven by — not incompatible with — profit-seeking activity. The "prevailing standard of analysis" under the antitrust laws is the rule of reason, which condemns only restrictive practices that are proved to be anticompetitive in a particular case. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977). This Court has condemned a handful of business practices *per se*, but only when "experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 343-344 (1982).

The decision in *Albrecht* v. *Herald Co.* was supported by no such confident prediction. Rather, the Court relied on a rigid view that any price restraint, even a vertical restraint that only lowered the price of a single brand, must be proscribed no matter how much it helped consumers. Experience and analysis show that maximum resale price maintenance rarely, if ever, injures consumers. The costs of the *Albrecht* rule to consumers and manufacturers alike are substantial, while the benefits to consumers are imperceptible if they exist at all.

I. *PER SE* CONDEMNATION OF MAXIMUM RESALE PRICE MAINTENANCE CONFLICTS WITH MODERN ANTITRUST POLICY AND PRECEDENT

This Court now limits *per se* illegality under the antitrust laws to "conduct that is manifestly anticompetitive, that is, conduct that would always or almost always tend to restrict

competition and decrease output." *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988) (citations and internal quotation marks omitted). To meet that standard, a practice must both have a "pernicious effect on competition" **and** "lack * * * any redeeming virtue." *GTE Sylvania*, 433 U.S. at 50 (quoting *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5 (1958)). *Per se* condemnation cannot rely on the uncritical application of familiar labels, but must be rooted in the realities of the marketplace: a "departure from the rule-of-reason standard must be based on demonstrable economic effect rather than * * * formalistic line drawing." *Id.* at 58-59.

Maximum resale price maintenance cannot conceivably be condemned *per se* under those "demanding standards." *GTE Sylvania*, 433 U.S. at 50. Far from having a "pernicious effect," the imposition of price ceilings by individual manufacturers can only intensify interbrand competition by limiting the amount added to a competitive wholesale price in the course of retail distribution. And the "redeeming virtue" of price ceilings is obvious. As Justice Brennan wrote for this Court, "Low prices benefit consumers regardless of how those prices are set." *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 340 (1990) ("*ARCO*"). That is true "regardless of the type of antitrust claim involved." *Ibid.* See also *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993).

The continued *per se* treatment of maximum resale price maintenance — which "always or almost always" poses no anticompetitive threat at all, and tends to increase demand and therefore output by lowering distribution costs — stands the test for *per se* treatment on its head. See Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981). The Court should correct this anomaly in the antitrust laws and return maximum resale price maintenance to rule-of-reason analysis.

A. This Court recently acknowledged that "[t]he procompetitive potential of a vertical maximum price restraint

is more evident now than it was when *Albrecht* was decided." *ARCO*, 495 U.S. at 343 n. 13. Indeed, economists and legal scholars approach unanimity in the view that it is baffling that resale price ceilings are condemned in any but the most extraordinary circumstances. *Per se* condemnation is even more difficult to comprehend. *E.g.*, 8 P. AREEDA, ANTITRUST LAW ¶ 1634 (1989) ("maximum price limitations * * * should be presumptively lawful"); G.F. MATHEWSON & R.A. WINTER, COMPETITION POLICY AND VERTICAL EXCHANGE 14 (1985) (*per se* treatment of vertical price ceilings "ignor[es] completely all economic arguments"); R. BORK, THE ANTITRUST PARADOX 281-282 (1978; 1993 ed.) (criticizing "inflexible" prohibition despite lack of "anticonsumer effect"). As a former Antitrust Division chief economist observed, from an economic point of view, maximum resale price maintenance "is unambiguously beneficial both to consumers and society as a whole." Warren-Boulton, *Resale Price Maintenance Reexamined:* Monsanto *v.* Spray-Rite, in THE ANTITRUST REVOLUTION 371, 402 n.31 (J. Kwoka & L. White eds., 1989). See also, *e.g.*, Ippolito, *Resale Price Maintenance: Empirical Evidence From Litigation*, 34 J.L. & ECON. 263, 269 (1991) ("[M]aximum RPM allegations * * * have little economic support as antitrust charges."); Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886, 890 n.20 (1981) ("Maximum resale price fixing has none of the potential anticompetitive consequences of horizontal maximum price fixing * * *."); *ARCO*, 495 U.S. at 343 n.13 (citing commentaries).

The decision in *Albrecht*, by contrast, reflects no attention at all to the most important factor bearing on whether maximum resale price maintenance should be condemned *per se*: the strong likelihood that "imposing a ceiling on resale prices may benefit consumers without any longer-term anticompetitive effects." 3 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 734e, at 263 (1978). Rather than relying on any "demonstrable economic effect" (*GTE Sylvania*, 433 U.S. at 59) of price ceilings, the justifications for *per se* treatment advanced in

Albrecht reflect — in hindsight, and with respect — confused and self-contradictory analysis that mixes the effects of horizontal price fixing among competitors with the effects of vertical price restraints affecting a single brand, and mixes the potential effects of minimum resale price maintenance and with those of maximum resale price maintenance.

The Court in *Albrecht* attempted by mere say-so to equate maximum resale price maintenance with minimum resale price maintenance, declaring that (390 U.S. at 153):

> if the actual price charged under a maximum price is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices.

But the statement does not prove what it attempts to prove. Instead, it is tautological: the "minimum price" toward which price ceilings tend is "the actual cost of the dealer" — that is, the price in a perfectly competitive market.[3] That is scarcely an anticompetitive harm. To the contrary, "there is little or no

---

[3] Judge Posner observed that, in defending against Justice Harlan's dissent, the *Albrecht* majority "demolishe[d] the intellectual foundations" of the rule against **minimum** resale price maintenance. R. POSNER, ANTITRUST LAW 158 (1976). The Court maintained that it was "beyond dispute that a substantial number of manufacturers formulate and enforce complicated plans to maintain resale prices because they deem them advantageous," and that in many situations manufacturers may "rightly regard minimum resale price maintenance to be in their interest." 390 U.S. at 151 n.7. By recognizing that minimum resale price maintenance was not characteristically the product of a retailer cartel, the Court took away the basis for assuming that the practice is almost always anticompetitive. Empirical evidence confirms that most uses of minimum resale price maintenance result from manufacturers' acting in their perceived self-interest; "collusion theories appear to be a relatively minor explanation for RPM-type practices overall." Ippolito, *Resale Price Maintenance: Empirical Evidence From Litigation*, 34 J.L. & ECON. 263, 293 (1991).

reason to fear that a vertical maximum might be an undetected minimum." 8 AREEDA, *supra*, ¶ 1637c, at 406. Vertical maxima do not facilitate, but rather combat, retailer cartels. See BORK, *supra*, at 452-453.[4]

The *Albrecht* Court also claimed that competitive harm might result from "substituting the perhaps erroneous judgment of a seller for the forces of the competitive market." 390 U.S. at 152. But that statement is puzzling. First, the antitrust laws have no mission to prevent "erroneous" benefits to consumers. Second, what *Albrecht* substitutes for the judgment of the seller is simply the "perhaps" equally "erroneous" judgment of the retailer who wants to raise price, reduce output, and harm consumers.[5] The Court provided no reason for preferring retailers' judgment that consumers should pay more to manufacturers' judgment that consumers should pay less. Indeed, because manufacturers are likely to take a broader perspective in both time and geography, their judgment is likely to be more

[4] In contrast to the present case, the maximum price agreement at issue in *Arizona* v. *Maricopa County Medical Society* raised concerns about disguised minimum price fixing because it was an explicit horizontal maximum price fixing agreement between "independent competing entrepreneurs" (457 U.S. at 357) and thus had the characteristics of a classic cartel. While agreeing that the *Maricopa County* agreement should be condemned, the United States urged the Court not to apply an unbending *per se* rule even to horizontal maximum price fixing, but rather to conduct a preliminary "quick look" analysis to determine whether the agreement was "essential to the operation of integrated productive activity." Brief for the United States as Amicus Curiae at 20, 22, *Arizona* v. *Maricopa County Medical Society*, No. 80-419. If so, the United States argued, the agreement should be analyzed under the rule of reason. *Id.* at 19-24.

[5] A third and equally powerful refutation of the *Albrecht* majority's reasoning — obvious in 1997 but understandably overlooked in the pre-deregulation era when *Albrecht* was decided — is that government regulation of pricing behavior is far more likely to produce an "erroneous" price than is the unconstrained operation of market forces. See S. BREYER, REGULATION AND ITS REFORM 58-59, 158-160, 184-187 (1982).

informed — and more oriented toward long-term benefits — than that of localized retailers. And the *Albrecht* Court's speculation (390 U.S. at 152-153) that manufacturers might persist in setting maximum prices "too low for the dealer to furnish services" needed or desired by consumers assumes the type of self-destructive behavior by manufacturers that "simply makes no economic sense" and renders the theory insupportable. See *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Much of the *Albrecht* Court's distaste for maximum resale price maintenance apparently derived from hostility toward a manufacturer's choice to "channel distribution through a few large or specifically advantaged dealers," particularly through the use of "exclusive territories" (as in *Albrecht* itself). 390 U.S. at 153. See also *id.* at 154 (citing *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)). But in *GTE Sylvania* and other cases, the Court since has overruled *Schwinn* and recognized that manufacturers by and large should be permitted to structure the distribution of their products as they see fit, whether through exclusive territories or otherwise.

Albrecht does not protect competitive markets, but substitutes judicial control for marketplace imperatives, largely in the name of protecting manufacturers from their own "perhaps erroneous judgment" (390 U.S. at 152). But that is not the business of the antitrust laws. As Justice Holmes observed, "the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear"; a free actor in a free market generally will "know[ ] better" than courts "what will enable it to do the best business." *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 411, 412 (1911) (dissent). Allowing dealers to exploit market imperfections that are supported (if they are not, indeed, *created*) by the artifice of the *per se* prohibition on resale price ceilings does not defer to the market, but rather encourages localized market failures to the detriment of

consumers and manufacturers alike. See generally BREYER, *supra*, at 185-186.

B. It cannot be overemphasized that maximum resale price maintenance is a purely **vertical** restriction that affects the price only of single brands of products in markets that presumably are subject to interbrand competition. This Court has "recognized that the scope of *per se* illegality should be narrow in the context of vertical restraints," *Business Electronics*, 485 U.S. at 724, and with good reason: "[W]hen interbrand competition exists," as it does in most industries including automobile manufacturing, "it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." *GTE Sylvania*, 433 U.S. at 52 n.19. This Court long ago acknowledged that "[e]conomists have identified a number of ways in which manufacturers can use [vertical] restrictions to compete more effectively against other manufacturers." *Id.* at 54-55. As a result, "there is substantial scholarly and judicial authority supporting the[ ] economic utility" of vertical restrictions, and "little authority to the contrary." *Id.* at 57-58.

Resale price ceilings generally **help** consumers rather than harm them; lower prices are a goal of competition, not its enemy. "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels" — and predatory pricing is condemned regardless of the use of resale price ceilings — "they do not threaten competition." *ARCO*, 495 U.S. at 340. And **resale** price ceilings imposed by manufacturers that themselves compete on price and quality, as opposed to ceilings imposed by agreements among horizontal competitors, **cannot** injure competition, because they do not hinder any additional margin-cutting that may result from aggressive price competition among retailers — competition that is squarely in the economic interest of both manufacturers and consumers. See *GTE Sylvania*, 433 U.S. at 56. For those reasons, even vigorous proponents of *per se* condemnation of **minimum** resale price maintenance, including the current

chairman of the Federal Trade Commission, have recognized that **maximum** resale price maintenance "raises a host of different issues and probably should be treated under a rule of reason." Pitofsky, *In Defense of Discounters: The No-frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487, 1490 n.17 (1983).

The *Albrecht* majority relied on a conception of the antitrust laws under which consumers were secondary if they mattered at all. That is wholly inconsistent with succeeding decisions that recognized that the Sherman Act was intended to be a "consumer welfare prescription." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979). Moreover, the mistaken condemnation of practices like maximum resale price maintenance that reduce consumer prices is "especially costly." *Matsushita*, 475 U.S. at 594. The behavior condemned is a form of price cutting, and "cutting prices in order to increase business often is the very essence of competition." *Ibid.*

In the rare instance in which "anticompetitive effects are shown to result from particular vertical" maximum resale price restraints, "they can be adequately policed under the rule of reason." *GTE Sylvania*, 433 U.S. at 59.[6] Those few circum-

---

[6] The "exceptions" to *per se* **legality** proposed by Professor Areeda (see 3 AREEDA & TURNER, *supra*, ¶ 734e, and 8 AREEDA, *supra*, ¶ 1638b) have little to do with maximum resale price maintenance in itself and much to do with independently illegal practices. An "exception" for "disguised" minimum price maintenance means only that any price restraints that function as price floors should be treated as price floors regardless of their form. An "exception" for the use of maximum resale prices in a predatory pricing scheme adds nothing to the existing condemnation of predatory pricing. And, although a vertical price restraint by a monopolist conceivably might fall afoul of the rule of reason, even in that circumstance it would be difficult to demonstrate that a maximum resale price harmed consumers in any way not fully achievable if the monopolist raised its wholesale price (causing retailers to reduce services) or integrated vertically. In any event, the Court need not today decide that maximum resale price maintenance is *per se* lawful; a holding that the rule

stances should not sustain a rule that forbids attainment of the benefits that would result from the great bulk of vertical price ceilings.

II. PER SE CONDEMNATION OF MAXIMUM RESALE PRICE MAINTENANCE IMPEDES OR DETERS SUBSTANTIAL PROCOMPETITIVE CONDUCT IN THE AUTOMOBILE INDUSTRY

The effects of the *per se* prohibition of maximum resale price maintenance reflect the very "unintended and undesirable rigidity in the law" that counsels against the application of *per se* rules. *GTE Sylvania*, 433 U.S. at 50 n.16. The experience of the automobile industry reveals a variety of circumstances in which the ability to impose resale price ceilings would advance manufacturers' ability to compete by lowering prices to consumers.

New automobiles are sold in the United States almost exclusively through networks of independent, franchised local dealers. Although automobile dealers do not have exclusive territories, several factors may contribute to give a dealer practical control over access to a brand of vehicles in a particular geographic area. The most obvious factor is geographic dispersion, resulting in large part from the efficiency-driven consolidation that has occurred at the dealership level over the past 50 years: less than half as many dealers sell three times as many vehicles as in 1949. *The 100 Year Almanac*, AUTOMOTIVE NEWS, April 24, 1996, at 112, 122, 128. Dealers in lower volume lines are, naturally, more distant from one another; some manufacturers separate their dealers by larger distances in order to attain the service levels associated with exclusive dealerships. In addition, state "dealer protection" statutes often give dealers some form of veto power over the location or relocation of a dealer in the same brand within a given geographic territory,

---

of reason applies would suffice to require reversal in this case.

creating *de facto* exclusivity regardless of market efficiencies and manufacturer desires or policies.[7]

These conditions may impair or nullify intrabrand competition. Various temporary market conditions — ranging from consumer fashion to disparities in manufacturing and distribution costs for the nearest competing models for other brands — may combine to permit dealers, in some circumstances, to exercise a degree of pricing power.

Each new vehicle must display a sticker noting the manufacturer's suggested retail price ("MSRP") for the vehicle and any factory-installed optional equipment, as well as any transportation charges to the dealer. See 15 U.S.C. § 1232(f). But, as any recent car buyer is aware, the MSRP is generally just a starting point for bargaining between dealer and purchaser.

To the manufacturer, the difference between the retail and the wholesale price of its product is simply a cost of distribution, just as if the manufacturer paid employees to sell vehicles at retail. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 146 (1984). But the *per*

---

[7] See, *e.g.*, BUREAU OF ECONOMICS STAFF REP. TO THE FEDERAL TRADE COMM'N, THE EFFECT OF STATE ENTRY REGULATION ON RETAIL AUTOMOBILE MARKETS (1986) ("STATE ENTRY REGULATION"). By 1984, "thirty-nine states [had] passed laws restricting the establishment of new automobile dealerships in the vicinity of present dealers selling cars of the same make." *Id.* at 1. See ABA ANTITRUST SECTION, FRANCHISE PROTECTION: LAWS AGAINST TERMINATION AND THE ESTABLISHMENT OF ADDITIONAL FRANCHISES 89 n.339 (Monograph No. 17, 1990) (listing 37 such statutes). Almost all states now restrict manufacturers' ability to induce intrabrand competition. *In Defense of Car Dealers*, BUS. WK., Apr. 18, 1996, at 17 (letter from John P. Peterson, President, National Automobile Dealers Ass'n) (49 state laws restrict manufacturers from "arbitrarily adding dealerships"; 40 states have "Relevant Market Area" provisions). The Bureau of Economics of the Federal Trade Commission concluded that these laws "raised car prices by a significant amount" (STATE ENTRY REGULATION, *supra*, at 8) that could cost consumers a total of "well over $3 billion per year" in 1985 dollars (*id.* at 108).

se prohibition on maximum resale price maintenance often confines the manufacturer's influence on the retail price to unenforceable suggestions. As Professor Areeda observed, "[U]nenforced price suggestions are unlikely to realize th[e] benefits" of price ceilings or other price maintenance arrangements. 8 AREEDA, *supra*, ¶ 1623c, at 269. If the *per se* ban is lifted, resale price ceilings are unlikely to become the norm in the automobile industry, but rather would provide an appropriate and effective device for manufacturers to respond to particular market conditions or particular types of dealer conduct.

A. The "Double Mark-Up" Inherent In Independent Retailing Aligns Manufacturers' Interests In Maximizing Output With Consumer Interests In Lower Retail Prices

1. Although manufacturers and dealers must work together in marketing new vehicles, their interests may diverge in particular market circumstances — particularly since participants at each level view the others' profits as costs to themselves. A manufacturer is likely to take a broader view of the economics of automobile distribution, based on far more comprehensive knowledge about conditions in increasingly global markets, resulting from continued efforts to sell vehicles through a network of hundreds or thousands of dealers. A dealer operating in a single locality has less access to information, and a narrower perspective as to the appropriate price. While a manufacturer's view of pricing must encompass both its own profit and sufficient dealer profits to ensure incentives to efficient distribution, the dealer logically views the manufacturer's profit as an undifferentiated element of input costs. That may lead the dealer to set a price that is higher than would maximize joint profits. MATHEWSON & WINTER, *supra*, at 13-14.

More fundamentally, a manufacturer subject to intense interbrand competition that depresses wholesale margins (as in

the automobile industry) will generally seek to maximize the sales volume of its product through efficient distribution with low intermediate markup: "For a given wholesale price," a manufacturer "wants the lowest retail price in order to sell more units." Easterbrook, *Vertical Arrangements*, 53 ANTITRUST L.J. at 147. If dealer markups rise above the level needed to provide the level of service that will attract customers, consumers may choose other makers' products, and the manufacturer will lose business to other brands with more efficient, lower cost distribution networks. When it comes to the amount of retailer margins, therefore, the manufacturer's self-interest in selling vehicles in volume usually coincides with consumers' self-interest in low prices and maximum choice among makes and models.

By contrast with the manufacturer's motivation to increase unit sales, a dealer may find it more profitable in the near term to reduce output (*i.e.*, yield some sales to other dealers or to consumer inaction) by increasing the margin on each vehicle. That motivation is especially powerful if the dealer can take advantage of temporary shortages in supply in the face of high demand.

For example, a manufacturer may want to stimulate demand with a $500 price decrease. Under current law, the manufacturer's principal recourse is to decrease the **wholesale** price in some form, without any guarantee that the reduction will be passed through to consumers and thus will increase sales volume. A dealer, by contrast, may find it more profitable to treat the $500 as profit and to sell the same number of vehicles at current demand levels with a far higher profit margin. That disposition to retain manufacturer discounts is exacerbated by low prevailing margins for dealers in a highly competitive interbrand market (which would be the normal stimulus for the manufacturer to reduce price).

2. Automobile manufacturers may need to increase sales in a particular line for urgent reasons other than immediate revenue generation. Automobiles are expensive to make, store,

and ship; dealer networks play integral roles in automobile manufacturers' inventory management and capacity utilization. Idle production capacity and unsold inventory are extremely expensive for manufacturers, but dealers are not necessarily as sensitive to which models need to be sold more quickly to resolve manufacturers' inventory or capacity concerns. Inefficiencies in inventory and production capacity lead to higher costs and thus to higher wholesale prices, ultimately harming consumers, dealers, and manufacturers alike.

Automobile manufacturers' views of the ideal retail price levels may diverge from those of dealers for another reason. Manufacturers depend on long-term customer loyalty to generate repeat purchases. An automobile manufacturer views a potential sale not just as a single transaction but as a foothold on remaining automobile purchases over the course of the buyer's lifetime. A customer who encounters too much difficulty in finding an acceptable price at one dealership may try a dealership with a different brand, and may forge a long-term relationship with another maker. And a buyer who becomes dissatisfied with the price **after** her purchase may switch brands rather than merely dealerships. Because dealers use manufacturers' brand names, dissatisfied customers are likely to blame the maker as much as the dealer, potentially costing the manufacturer several transactions in the future.

Some dealers — unlike manufacturers — may be more focused on the sale in front of them. Even the many dealers that cultivate repeat business rationally may value that factor somewhat less than manufacturers. Repeat purchases within the brand benefit the manufacturer no matter where they are made. By contrast, an individual dealer's ability to take advantage of customer loyalty to a particular brand of car may be undercut both by intrabrand competition from other dealers and by customers leaving the geographic area.

3. The various fluctuations in the supply of and demand for vehicles, combined with *de facto* exclusivity, may provide

an opportunistic automobile dealer with a chance to charge prices that increase the dealer's total margin despite exceeding the optimal market-clearing price.[8] Unless it has interbrand market power (which retailers rarely have, *Business Electronics*, 485 U.S. at 727 n.2), a dealer that trades volume for higher margins simply deflects some consumers away from the brand of vehicles they would have chosen first (and which the manufacturer would willingly sell at a transaction-effecting price).

Even if interbrand competition provides consumers with a measure of relief from these serious market imperfections, there certainly is no reason to prevent manufacturers from controlling the sale of their products to prevent the thwarting of consumer preferences and the muting of interbrand competition. The consumer who wants to purchase the "hottest" new sport-utility vehicle (or the most popular family car) and the manufacturer that wants to clear its inventory both suffer considerable harm from even localized, single-brand price distortions:

> The detriment to the consumer is obvious: higher prices. The detriment to the manufacturer is equally clear: fewer sales. The manufacturer thus serves both his own interests and those of consumers by * * * preventing dealers from profiting more than necessary for effective performance of the distribution function. This protects the public from price gouging.

8 AREEDA, *supra*, ¶ 1636a, at 395.

---

[8] Conversely, dealers may not exploit competitive advantages in a way that benefits manufacturers (through maximum volume) and consumers (through lower prices). A manufacturer that has created a highly efficient distribution system would prefer that its dealers take advantage of that efficiency to price lower than rivals and maximize sales. But dealers facing less efficient interbrand rivals may opt to earn higher margins on fewer sales. The manufacturer's attempt to compete therefore may be stifled.

The economist's solution to the problem is simple: "a vertical price ceiling is normally welfare-optimal in the sense that all affected parties are better off if the practice is allowed." MATHEWSON & WINTER, *supra*, at 14. Once the maximum joint profit (the difference between the optimal price and the manufacturer's cost) is limited, the dealer is in a position to bargain for its appropriate share of that pie, which is smaller per unit but larger in the aggregate than the total profit that results from unrestrained dealer markups. *Id.* at 13-14.

But current law forbids this welfare-maximizing behavior. The *per se* prohibition on maximum resale price maintenance limits the effectiveness of manufacturers' efforts to ensure optimal pricing. Manufacturers have developed several less direct techniques of prompting spot price reductions or heading off spot increases in resale prices. We examine these techniques, and the limitations imposed by the *per se* rule, below.

B. The *Per Se* Prohibition On Maximum Resale Price Maintenance Hinders The Competitive Effect Of Dealer Incentives

Interbrand competition often requires manufacturers to attempt to stimulate retail demand in order to dispose of excess inventory or to use production capacity efficiently. These targeted price reductions, or dealer incentives, are an important method of competing against other brands.

For example, manufacturers may provide free or attractively priced optional equipment on a line of vehicles in an attempt to increase sales of a sluggish model, or as part of a regionwide promotion (*e.g.*, air conditioning at no extra charge on all vehicles sold in the Southeast). When the promotion applies to vehicles that have not been shipped to dealers, the MSRP can reflect the discount, providing some, albeit imperfect, assurance that most or all of the discount will reach consumers. To apply a similar promotion to vehicles that already are on dealer lots (with full-price MSRP stickers), a manufacturer rebates to the dealer its cost of the option. But,

under *Albrecht*, the manufacturer cannot require that the dealer agree to pass through the entire value of the option in the form of a retail price cut. As a result, a dealer may have the opportunity to split the cost of the option with the consumer by raising the vehicle price in another way (such as through an additional, more profitable option). To ensure that the advertised promotion is accurate and has the desired effect on the price to consumers, a manufacturer is confined to post-sale auditing and monitoring; attempts to enforce pass-throughs strictly can produce a dealer claim that the manufacturer is attempting to impose a resale price ceiling that is illegal under *Albrecht*.

Another common targeted price reduction is the old-model allowance or dealer cash program under which, late in the model year, dealers receive a small but significant percentage of the manufacturer's suggested retail price on each unit remaining in the dealer's inventory. These allowances are intended to induce dealers to lower retail prices by a corresponding amount, accelerating sales of the old models to make room for new models. But some dealers view these allowances as straightforward subsidies. The net result is to increase rather than to decrease dealer markups, on vehicles whose very retention in inventory demonstrates that demand is relatively low. The manufacturer's attempted response to market demand often disappears with scarcely a trace.

Automobile manufacturers can attempt to reduce the dealers' share of promotional funds by offering cash rebates directly to consumers purchasing certain models. But direct rebate programs entail substantial administrative expense, and dealers can capture much of the rebate amount simply by raising the net sale price of vehicles. The MSRP is not an entirely reliable measure of actual negotiated sales prices; most consumers know that fact and little more. And consumers often purchase according to the monthly payment amount (whether for a lease or a purchase) rather than the price, making dealer adjustments more difficult to detect by consumers and manufacturers alike.

Any attempt by a manufacturer to enforce a strict requirement that dealers pass through incentives to consumers risks condemnation as an excessive restraint on maximum resale prices under *Albrecht*. That is almost exactly what the petitioner in the present case did, setting a constant margin so that retail prices effectively had to trace changes in wholesale prices.[9] As a result, even those automobile manufacturers that would like to require that promotional funds be passed along to consumers can make only limited attempts to enforce compliance.[10]

C. The *Per Se* Prohibition On Maximum Resale Price Maintenance Hinders Manufacturers' Attempts To Protect Consumers From Dealer Opportunism

The reliance of automobile manufacturers on customer brand loyalty provides a strong motivation to discourage dealers from imposing excessive markups. It is difficult to cultivate brand loyalty in a customer who believes she has been overcharged. Although many dealers do not find it in their own interest to inflate retail margins, some dealers seize the occasional opportunity to do so. Because manufacturers cannot place upper limits on retail prices, however, they have little ability to ensure that consumers get the benefit of competitive

---

[9] In our view, the resolution of the first question on which review was granted — whether a retailer subject to maximum resale price maintenance has standing to recover damages under the antitrust laws — depends on the resolution of the second question. If **all** resale price ceilings violate the antitrust laws, a theory supporting *per se* treatment presumably could supply a theory of antitrust injury encompassing retailers. Under the rule of reason, a retailer would have difficulty demonstrating antitrust injury based on his inability to charge higher prices to consumers.

[10] Manufacturer-sponsored parts and service promotions face the same risks of unenforceable pass-through. Similar difficulties sometimes arise in the context of manufacturer employee benefit programs under which employees are supposed to be able to purchase the manufacturer's vehicles at "cost."

wholesale prices or dealer incentives regardless of temporary, localized market conditions.

One common device that dealers use is the imposition of "additional dealer profit" (ADP) or "additional dealer markup" (ADM) on the price of a popular vehicle or "hot model." In addition to the MSRP sticker, dealers may print their own "second stickers," which often brazenly include a four-figure additional markup as a line item for "ADP" or "ADM." The MSRP sticker, traditionally the starting place for bargaining **down** a retail price, becomes instead the starting place for a substantial **increase** in price.

Manufacturers have no effective recourse to prevent second-stickering or ADP. They are equally powerless in the face of another familiar price-increasing device, the addition of more profitable "options" to a vehicle on the sales floor. The latter practice is not restricted to "hot models." Most car buyers are familiar with the attempts of dealers to add options to a vehicle that a buyer has selected but on which she has not yet closed a deal. Despite the potential harm of these practices to manufacturer interests in long-term customer brand loyalty, manufacturers may not be able to contract with dealers not to engage in these practices; doing so would be similar to the practice challenged in the present case, and would present a risk of liability under current law.

But consumers who are subjected to these practices by a minority of dealers eventually figure out that they have paid too much. And, despite the restrictions placed on manufacturers by *Albrecht*, consumers (who generally are unaware of legal niceties) hold automobile makers responsible for the fairness and efficiency of their distribution networks.

To be sure, the opportunity for imposing an additional markup may result only from the manufacturer's decision to accept a reduced margin on the wholesale price in the near term in the hope of securing greater consumer good will (and greater volume) in the long term. From the dealer's short-term perspec-

tive, the manufacturer may be leaving money on the table. But, even if the manufacturer's low wholesale price is properly attributed to its failure to appreciate the strength of demand for a particular model, the antitrust laws should not be concerned with — much less prohibit *per se* — the manufacturer's efforts to smooth the effects of temporary supply shortages by maintaining prices that are below the peak of the demand curve. To the contrary, any attempt to pass on benefits to consumers "erroneous[ly]" (*Albrecht*, 390 U.S. at 152) should be encouraged, not threatened with treble-damages lawsuits.

D. The *Per Se* Prohibition On Maximum Resale Price Maintenance Hinders Brand-Wide Price Advertising

Most advertising by automobile manufacturers appears in media of national, regional, or metropolitan scope. Yet manufacturers cannot engage in effective price advertising because they are unable to ensure that the first dealer visited after an ad runs will not exceed the advertised price. Rather, at most a manufacturer can advertise a "suggested price" that may be available only at "participating dealers."[11]

If there were no *per se* ban on maximum resale price maintenance, however, a manufacturer could advertise (and thus compete) on price in a far more realistic and reliable manner. A manufacturer's advertisement could state forthrightly that a vehicle's price would be "no more than X" — allowing dealers leeway to compete away some of the remaining margin and offer lower prices — without risking customer disappointment upon visiting "non-participating" dealers. Consumers would get more valuable information from such advertising and manufacturers could increase their credibility and thus enhance brand loyalty.

---

[11] In current market conditions, the advertised figure is more likely to be a monthly lease or purchase payment than a total purchase price.

The recent efforts of some manufacturers to implement "one-price" or "no-haggle" pricing also would be bolstered if maximum resale price maintenance were no longer condemned *per se*. Some consumers clearly prefer firm pricing of new vehicles. Yet price advertising is difficult for the reasons outlined above, and manufacturers' one-price policies may be difficult to enforce if disputes arise; indeed, both federal and state antitrust authorities have raised questions about the practice, though they have not yet tried to stop it. *Feds' Pricing Probe May Tie Up Industry For Years*, AUTOMOTIVE NEWS, Oct. 17, 1994, at 1, 45.

E. The *Per Se* Prohibition Of Maximum Resale Price Maintenance Creates Uncompensated Inefficiencies

Resale price ceilings are the most efficient means of ensuring that dealer distribution costs do not swallow any efficiencies in manufacturing. Wholesale price reductions and promotional funds are imperfect competitive instruments when an intermediary can suppress their effect on retail prices.

The question for antitrust law is not whether there is anything inherently wrong with dealers seeking to maximize their profits by calibrating prices to the maximum consistent with a level of demand acceptable to the dealer. Rather, the question is whether a manufacturer that uses maximum resale price maintenance to place an upper limit the prices of its own products "always or almost always" injures competition — *i.e.*, consumers. Indisputably it does not.

To be sure, manufacturers have developed alternative means of stimulating price reductions to meet competitive circumstances, and some of those means have survived challenges in the courts. Many lower courts have been justifiably reluctant to give *Albrecht* an expansive reading, and accordingly have approved a variety of devices intended to impose resale price ceilings of some kind, finding for a variety of reasons that the net result of each device was not to "fix" prices vertically. *E.g.*, *AAA Liquors, Inc.* v. *Joseph E. Seagram & Sons, Inc.*, 705

F.2d 1203 (10th Cir. 1982) (finding no "coercion" by manufacturer), cert. denied, 461 U.S. 919 (1983); *Lewis Service Center, Inc.* v. *Mack Trucks, Inc.*, 714 F.2d 842 (8th Cir. 1983) (allowing *post hoc* wholesale price reduction limited to extent necessary to afford stated minimum profit on reduced retail price), cert. denied, 409 U.S. 1077 (1984); *FLM Collision Parts, Inc.* v. *Ford Motor Co.*, 543 F.2d 1019 (2d Cir. 1976) (allowing manufacturer to restrict discounts on wholesale price to sales to specified class of purchasers), cert. denied, 429 U.S. 1097 (1977).

But other courts suggest that they will find "vertical price-fixing" whenever a retailer is "in any way restricted in its freedom to set whatever prices it charged." *Discon, Inc.* v. *NYNEX Corp.*, 93 F.3d 1055, 1060 n.5 (2d Cir. 1996); *Pearl Brewing Co.* v. *Anheuser-Busch, Inc.*, 339 F. Supp. 945 (S.D. Tex. 1972). And the indirect means of limiting resale prices are less certain than the enforcement of resale price ceilings. Moreover, even unsuccessful antitrust challenges often proceed into expensive discovery, diverting resources that would be better used in business improvements or lower prices. The very real threat of antitrust litigation in response to any practice that resembles maximum resale price maintenance is a strong deterrent. See Ippolito, *Resale Price Maintenance: Empirical Evidence From Litigation*, 34 J.L. & ECON. 263, 269, 293 (1991). As one scholar recently noted (*id.* at 293):

> the long-standing concern that the per se standard prohibiting RPM deters too many efficiency uses of RPM may actually understate the potential severity of the problem. The stricter de facto liability standard for RPM acts to discourage RPM-like activities beyond those that the courts would find in violation of the per se standard.

See also Baumol & Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247, 254 (1985); Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 6 (1984).

This legal uncertainty hinders activity that would heighten interbrand competition and lower consumer prices. Heightened competition and lowered prices — brought about by market forces rather than government edict — are properly the goals of the antitrust laws, not the objects of *per se* illegality.

III. *STARE DECISIS* DOES NOT WARRANT RETAINING *PER SE* CONDEMNATION OF RESALE PRICE MAINTENANCE

The *per se* condemnation of maximum resale price maintenance has received the type of skeptical response from scholars and lower courts that supported the overruling of the *per se* ban on exclusive territories in *GTE Sylvania*, 433 U.S. at 47-48. As we pointed out above, the "great weight of scholarly opinion has been critical," and "a number of the federal courts confronted with analogous vertical restrictions have sought to limit [*Albrecht*'s] reach." *Id.* at 47-48 & nn.13-14. Although the efforts of the courts may be "a tribute to judicial ingenuity" in the pursuit of economic rationality and efficiency, *id.* at 48 n.14, a sensible system of jurisprudence should not force the courts to whirl in doctrinal epicycles in order to reconcile insupportable rules with rational results.

It is absolutely vital to an efficient economy that this Court venture "to second-guess the wisdom of [its] *per se* rules." *ARCO*, 495 U.S. at 359 (Stevens, J., dissenting). "[D]ifferent sorts of agreements" may amount to restraints of trade "in varying times and circumstances." *Business Electronics*, 485 U.S. at 731. "It would make no sense," therefore, to leave the "line of *per se* illegality * * * forever fixed" while economic understanding, and markets themselves, change. *Id.* at 732. "If condemnation *per se* depends on a conclusion that almost all examples of some practice are deleterious, then discoveries of possible benefits lead to new legal rules." Easterbrook, *Limits*, 63 TEX. L. REV. at 10. *Per se* prohibitions on business conduct have enormous costs, not only from the activity prohibited but from legal activity deterred by the risk of burdensome litigation

and treble-damages judgments. See Baumol & Ordover, *supra*, 28 J.L. & ECON. at 254. *Per se* antitrust rules cannot depend for their persistence on decades or even centuries of history: what matters here is "the effect of the antitrust laws upon vertical distributional restraints in the American economy **today**." *GTE Sylvania*, 433 U.S. at 53 n.21 (quoting *Schwinn*, 388 U.S. at 392 (Stewart, J., dissenting)) (emphasis added).

The Court recognizes each Term that a change is necessary in an established legal doctrine, often in contexts that are less subject to material transformations in understanding and circumstances than are the legal proscriptions on business behavior. *See, e.g.*, Eskridge, *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988); D. O'BRIEN, SUPREME COURT WATCH –1993, at 11-13. The common law character of the Sherman Act makes the Court's correction all the more necessary, and dilutes the force of *stare decisis*. See Eskridge, *supra*, 76 GEO. L.J. at 1377-1381; Easterbrook, *Vertical Arrangements*, *supra*, 53 ANTITRUST L.J. at 136-140. Indeed, Congress recognized the "changing content of the term 'restraint of trade'* * * at the time the Sherman Act was enacted," *Business Electronics*, 485 U.S. at 731, and has "h[eld] the text of the Sherman Act inviolate" in the face of this Court's changing antitrust doctrines. Easterbrook, *Vertical Arrangements*, 53 ANTITRUST L.J. at 137. As Justice Stevens has pointed out, Congress fully "expect[ed] the federal courts to interpret [the Sherman Act] by developing legal rules on a case-by-case basis," so that "the doctrine of stare decisis d[oes] not preclude th[is] Court from overruling" those of its prior antitrust decisions that have not withstood the test of time and intensive analysis. *Guardians Ass'n* v. *Civil Service Comm'n of New York*, 463 U.S. 582, 641 n.12 (1983) (dissent).

"Just as what was once lawful may be proscribed under new approaches, so what was once condemned may be restored to legitimacy as judges reassess their earlier acts." Easterbrook, *Vertical Arrangements*, *supra*, 53 ANTITRUST L.J. at 139. A reassessment is appropriate here: rule-of-reason treatment for

maximum resale price maintenance is both "intrinsically sounder" than *per se* condemnation and "verified by experience" of the pro-consumer effects of holding down prices. *GTE Sylvania*, 433 U.S. at 58 n.30. Even cursory consideration of the market effects of maximum resale price maintenance makes it clear that a *per se* prohibition of the practice can only harm consumers. Accordingly, *Albrecht* should be overruled, and maximum resale price maintenance returned to the sphere of business practices that are subject to the "prevailing standard of analysis" (*GTE Sylvania*, 433 U.S. at 49): the rule of reason.

CONCLUSION

For the foregoing reasons, the judgment should be reversed.

Respectfully submitted.

PHILLIP D. BRADY
American Automobile Manufacturers Association
1401 H Street, N.W.
Suite 900
Washington, D.C. 20005

CHARLES H. LOCKWOOD, II
Association of International Automobile Manufacturers, Inc.
1001 19th Street North
Suite 1200
Arlington, Virginia 22209

STEPHEN M. SHAPIRO
ROY T. ENGLERT, JR.
Counsel of Record
DONALD M. FALK
MYLES R. HANSEN
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

Counsel for Amici Curiae

APRIL 1997